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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA
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12 PHILLIP BURTON HAUSKEN,

13 Plaintiff,

14 v.

15 CORRECTIONAL OFFICER SMOLECH,

16 Defendant.

17 CASE NO. C14-5037 BHS-JRC

18 REPORT AND RECOMMENDATION

19 NOTED FOR:
20 MARCH 21, 2014

21 The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States
22 Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. §
23 636(b)(1)(A) and (B), and Magistrate Judge Rules MJR3 and MJR4.

24 The Court recommends dismissal of this action as malicious. The Court recommends
25 dismissal prior to service with the dismissal counting as a strike pursuant to 28 U.S.C.
26 1915(e)(2)(B)(i) and (g).

27 Plaintiff has filed six actions in the last eighteen months challenging the fact that prison
28 officials are taking fifty cents a month from his prison account for cable television services.

1 Plaintiff alleges that he is in a unit that does not have cable television. *See Hausken v. Lewis et*
 2 *al* 12-5882BHS/JRC. Plaintiff's six actions are:

- 3 1. 12-5882BHS/JRC, Hausken v. Lewis et al,
- 4 2. 13-5346RJB/JRC, Hausken v. Lewis et al, (closed)
- 5 3. 13-5560BHS/JRC, Hausken v. Vande Weye et al, (closed as malicious)
- 6 4. 14-5037BHS/JRC Hausken v. Smolech et al,
- 7 5. 14-5072RBL/KLS Hausken v. Warner et al, and
- 8 6. 14-5138BHS/KLS Hausken v. Department of Corrections et al.

9 In the first action, 12-5882BHS/JRC, the Court granted defendants qualified immunity
 10 from damages, but the Court is proceeding with plaintiff's request for injunctive relief (12-
 11 5882BHS/JRC ECF No. 21). A motion for default is before the Court and ripe for
 12 consideration (12-5882BHS/JRC ECF No. 42). Thus, the first action is still an active case and
 13 the issue of taking money from plaintiff's trust account is still before the Court.

14 In the second action, 13-5346RJB, the Court denied plaintiff in forma pauperis status
 15 because the action was duplicative (13-5346RJB ECF No. 8). The Court's denial of in forma
 16 pauperis status saved petitioner \$350 and also prevented petitioner from receiving a strike for
 17 filing a duplicative action.

18 When plaintiff filed a third action involving the same claim, 13-5560BHS/JRC, the
 19 Court granted plaintiff in forma pauperis status and dismissed the action prior to service with
 20 the dismissal counting as a strike pursuant to 28 U.S.C. 19125(g) (13-5560BHS/JRC ECF No.
 21 12).

22 28 U.S.C. § 1915(a) gives the Court the authority to dismiss an action if the action is
 23 frivolous, malicious, or fails to state a claim. The standard for what constitutes "malicious" is
 24

1 not well defined, but some guidance exists. In *Abdul-Akbar v. Department of Corrections*, 910
 2 F. Supp. 986, 999 (D. Del. 1995), the District Court in Delaware considered the issue and stated:

3 A separate standard for maliciousness is not as well established. *Deutsch*, 67 F.3d at
 4 1085-87 merely states that a district court ‘must engage in a subjective inquiry into
 5 the litigant’s motivations at the time of the filing of the lawsuit to determine whether
 6 the action is an attempt to vex, injure, or harass the defendants.’ *Id.* Other Circuits,
 7 however, have offered more objective instances of malicious claims. For example, a
 8 district court may dismiss a complaint as malicious if it threatens violence or
 9 contains disrespectful references to the court. *Crisafi v. Holland*, 655 F.2d 1305
 10 (D.C.Cir. 1981); *see also Phillips v. Carey*, 638 F.2d 207, 208 (10th Cir. 1981)
 11 (stating that courts may dismiss pleadings with abusive or offensive language
 12 pursuant to the court’s inherent powers under FRCP 12(f)). In addition, a district
 13 court may dismiss a complaint as malicious if it is plainly abusive of the judicial
 14 process or merely repeats pending or previously litigated claims. *Id.*; *Van Meter v.
 15 Morgan*, 518 F.2d 366 (8th Cir. 1975); *Duhart v. Carlson*, 469 F.2d 471 (10th Cir.
 16 1972).

17 *Abdul-Akbar v. Department of Corrections*, 910 F. Supp. 986, 999 (D. Del. 1995). Other
 18 courts have found that the term “malicious” means irresponsible or harassing litigation. :

19 The legal standard of “frivolous or malicious” is not capable of precise definition for
 20 it is a standard intended for administration within the broad discretion of the court
 21 and to be applied with reasonable restraint but as a practical response to irresponsible
 22 litigation which would otherwise be subsidized and encouraged by the generosity of
 23 the *in forma pauperis* statute.

24 *Daves v. Scranton*, 66 F.R.D. 5 (E.D. Pa. 1975).

25 Plaintiff’s attempts to file multiple actions involving the same issue after being advised
 26 by the Court on multiple prior occasions that defendants are immune from damages constitutes
 27 malicious litigation. The Court recommends dismissal of this action with the dismissal counting
 28 as a strike. Plaintiff had an action dismissed for failure to state a claim in 2012, 12-0190RAL.
 29 The Court assessed a second strike in 2013, 13-5560BHS/JRC. If the District Court dismisses
 30 this case, this would be plaintiff’s third strike.

31 Because plaintiff’s issues are currently pending in another action, 12-5882BHS/JRC, the
 32 Court recommends that this dismissal be without prejudice.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
2 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.
3 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes
4 of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the
5 time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for
6 consideration on March 21, 2014, as noted in the caption.

7 Dated this 4th day of March, 2014.

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10 J. Richard Creatura
United States Magistrate Judge

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